IN THE

Mississippi Supreme Court

NO . 2012-UR-01108-SCT

MISSISSIPPI POWER COMPANY, *Appellant*

VERSUS

MISSISSIPPI PUBLIC SERVICE COMMISSION,
Appellee

AND

THOMAS A. BLANTON, *Cross Appellant*

☆☆☆

CONSOLIDATED WITH

NO. 2013-UR-00477-SCT

THOMAS A. BLANTON, APPELLANT

VERSUS

MISSISSIPPI POWER COMPANY, INC. AND
MISSISSIPPI PUBLIC SERVICE COMMISSION, APPELLEES

**ON APPEAL FROM THE MISSISSIPPI
PUBLIC SERVICE COMMISSION, DOCKET NO.: 2013-UN-014**

☆☆☆

ORAL ARGUMENT NOT REQUESTED

SUPPLEMENTAL BRIEF OF APPELLANT AND CROSS-APPELLANT, THOMAS A. BLANTON

MICHAEL ADELMAN, ESQUIRE
MS State Bar No. 1153
ADELMAN & STEEN, L.L.P.
224 Second Avenue
Post Office Box 368
Hattiesburg, MS 39403-0368
PH: 601/544-8291; FAX: 601/544-1421

COUNSEL FOR THOMAS A. BLANTON

TABLE OF CONTENTS

INDEX OF AUTHORITIES

ADMINISTRATIVE CASES

STATUTES

CONSTITUTIONAL PROVISIONS

RULES

OTHER REFERENCES

IN THE SUPREME COURT OF MISSISSIPPI

NO.: 2012-UR-01108-SCT

MISSISSIPPI POWER COMPANY, INC. **APPELLANT**

VERSUS

MISSISSIPPI PUBLIC SERVICE COMMISSION **APPELLEE**

and

THOMAS A. BLANTON **CROSS-APPELLANT**

☆☆☆

Consolidated with
No. 2013-UR-00477-SCT

☆☆☆

THOMAS A. BLANTON **APPELLANT**

VERSUS

MISSISSIPPI POWER COMPANY, INC. and
MISSISSIPPI PUBLIC SERVICE COMMISSION **APPELLEES**

SUPPLEMENTAL BRIEF OF APPELLANT AND
CROSS-APPELLANT, THOMAS A. BLANTON

STATEMENT OF ISSUES

(1) Does the Commission's decision to allow CWIP in Mississippi Power's rate base for the purposes of allowing Mississippi Power to recover its costs of financing the Kemper Project bind the Commission with respect to future applications for rate increases?

(2) Does Mississippi or federal statutory or constitutional law, or any applicable rule, require Mississippi Power to give notice to ratepayers of proposed rate increases?

(3) In *Southern Bell Telephone & Telegraph Co. V. Miss. Public Serv. Comm'n,* 237 Miss. 157, 208, 113 So. 2d 622, 639 (1959), the Mississippi Public Service Commission rejected the utility's request for CWIP costs inclusion in the rate base because, according to the Commission, this would force current ratepayers to pay a return on property constructed for future ratepayers, with the result that when the future ratepayers begin to receive the new, upgraded service, the utility would derive a double return on the cost of construction. Can such a result occur by CWIP costs under the provision contained in the Base Load Act?

(4) In general, how does the Commission determine, under the Base Load Act, who (between Mississippi Power and/or its investors and the ratepayers) bears the risks of any uncompleted or abandoned work or project or component associated with a new plant?

(5) In its order granting a certificate of need in No. 2009-UA-14, the Commission authorized MPC to construct the Kemper facility and to include CWIP in its rates. That order is pending appeal in *Sierra Club v. Mississippi Public Service Comm'n.,* No. 2013-CA-43. Is this case ripe for consideration in the absence of a ruling in Sierra Club? Would a ruling of this Court regarding whether a rate increase based on a plant under construction was just and reasonable be rendered moot if the certificate authorizing the construction of that plant was later held invalid?

(6) In the Settlement Agreement, the Commission acknowledged that "(a) Under the Commission's Final Order on Remand in MPSC Docket No. 2009-UA-14, MPC relied upon the recovery of CWIP financing costs related to the Kemper Project beginning in 2012[.]" When ratepayers/customers received MPC's notice of intent to increase rates in 2011-UN-135 and 2013-UN-014, were the rate increases sought a *fait accompli* as a result of MPC's reliance on the Order in No. 2009-UA-14? If so, did the ratepayers/customers receive notice of the proceedings in No. 2009-UA-14? If they did not, were they entitled to notice?

(7) Does the Baseload Act require a finding of prudency by the Commission prior to an increase in rates? If so, was there a finding of prudency made by the Commission? If the Commission made such a finding, when did that occur and what notice as provided to MPC ratepayers/customers of the proceedings? If the Commission has not made a finding of prudency, under what authority did the Commission increase rates?

(8) According to the Commission's brief, notice of a "special meeting" regarding the adoption of the Settlement Agreement was provided "consistent with the Open Meetings Act." Is notice under the Open Meetings Act consistent with the rules of the Commission

regarding notice?

SUMMARY OF ARGUMENT

1. The Commission is bound to follow the "Settlement Agreement" and allow not only CWIP but also adopt a seven (7) year rate mitigation plan and authorize the issuance of One Billion Dollars ($1,000,000,000.00) in "rate reduction" bonds. This commitment is apparent from the language in the Commission's March 5, 2013 Final Order, particularly Section E ("Commission Determination"). Under paragraph 48 of the Commission's Order, there can be no question that the Commission is committed to adopting the seven (7) year rate mitigation plan.

2. Constitutional due process requires that ratepayers receive notice of proposed rate increases and Section 77-3-37(8) of the Mississippi Code of 1972, as amended, requires that major rate changes only go into effect "pursuant to an order of the Commission after hearings held upon notice to the public." (Emphasis supplied.) Unless that notice provides the date, time and place at which members of the public may appear to contest, comment or simply voice their concerns regarding a proposed rate increase, the provision from Section 77-3-37(8) would have no meaning. Further, an interpretation of Section 77-3-37(8) consistent with due process is the appropriate interpretation.

3. The Supreme Court's decision in *Southern Bell Telephone and Telegraph Co. v. Mississippi Public Service Commission,* 237 Miss. 157, 208, 113 So. 2d 622, 639 (1959) is directly on point in this case. In fact, the *Southern Bell* decision actually presages a series of Mississippi Supreme Court cases in which the utility's request for CWIP cost

inclusion in the rate base have been denied. All of these cases are consistent with Mr. Blanton's challenge to the "Baseload Act."

4. Under the "Baseload Act," the risk of any uncompleted or abandoned work is placed directly on the backs of the ratepayers. Section 77-3-105(1)(a) of the "Baseload Act" specifically provides that CWIP assessments may be approved by the Commission whether or not the construction of any generating facility is ever commenced or completed, or whether or not the generating facility is placed into commercial operation. This Draconian provision is consistent with the fact that the "Settlement Agreement" provides for a seven (7) year rate mitigation plan as well as rate reduction bonds of One Billion Dollars ($1,000,000,000.00). For these reasons the risk of any uncompleted or abandoned work is placed directly on the backs of the ratepayers.

5. *Sierra Club v. Mississippi Public Service Commission,* No. 2013-CA-43 does not render this case moot. Mississippi Power Company is presently "taking" money from ratepayers and Mr. Blanton demands that Mississippi Power Company refund his money and that of every other person billed by Mississippi Power Company for the March 2013 assessment.

6. When ratepayers/customers receive MPC's Notice of Intent to Increase Rates in 2011-UN-135 and 2013-UN-014, these rate increases were a *fait accompli* as a result of Mississippi Power Company's reliance on the Order in 2009-UA-14. In the "Settlement Agreement," as quoted by the Court, Mississippi Power Company acknowledges this reliance and the need for the Commission to approve a CWIP assessment. There is nothing in the record to indicate that ratepayers/customers received notice of the proceedings in No. 2009-UA-

14 consistent with due process and consistent with an interpretation of Section 77-3-37(8) which complies with due process notice requirements.

7. To date, there has been no finding of prudence by the Commission regarding the Kemper Lignite Plant. In fact, in its Final Order, at paragraph 55, the Commission adamantly maintains that a finding of prudence is not a prerequisite to a rate increase including CWIP construction costs. However, the Commission's position regarding this issue is inconsistent with the language of Section 77-3-105(2)(a).

8. The purported "Settlement Agreement" was nothing more than an attempt to undermine Mr. Blanton's original cross-appeal in 2012-UR-1108-SCT. Directly on point is the Illinois Supreme Court's decision in *Business and Professional People for the Public Interest, et al. v. Illinois Commerce Commission,* 136 IL 2d. 192, 206-218 (1989) in which the Illinois Supreme Court held that a settlement agreement, granting a rate increase to Commonwealth Edison Company, was invalid because all of the parties before the Illinois Commission, including multiple interveners, had not joined in the so-called agreement. The "Settlement Agreement" should be vacated both because Mr. Blanton did not receive adequate notice and because ultimately as a fully approved and fully involved intervener, Mr. Blanton did not join in the "Settlement Agreement." Further, the "Settlement Agreement" violates 77-2-13 of the Mississippi Code of 1972, as amended, which prohibits *ex parte* communications between a public service commissioner and a litigant before the Commission. At the time of the "Settlement Agreement", the litigation between Mr. Blanton and Mississippi Power Company as well as the Commission continued. The

"Settlement Agreement" was the instrument that allowed Mississippi Power Company to go back before the Commission to seek and ultimately receive an eighteen percent (18%) rate increase. Obviously, the issues involved in the rate increase cases were pending at the time of the "Settlement Agreement." Those issues had not been resolved, either at the Commission level or at the level of the Supreme Court, and the execution of the "Settlement Agreement" constituted a direct violation of the ban set forth in Section 77-2-13.

ARGUMENT

(1) Does the Commission's decision to allow CWIP in Mississippi Power's rate base for the purposes of allowing Mississippi Power to recover its costs of financing the Kemper Project bind the Commission with respect to future applications for rate increases?

RESPONSE NO. 1: **Yes, the Commission is bound to follow the "Settlement Agreement" and allow not only CWIP but adopt a seven (7) year rate mitigation plan and authorize the issuance of One Billion Dollars ($1,000,000,000.00) in "rate reduction" bonds.**

The answer to this question really goes to the purported "Settlement Agreement." Mr. Blanton understands that Mississippi Power Company takes the position that the purported "Settlement Agreement" is simply a document pertaining to procedural matters. But without the "Settlement Agreement" there would have been no Commission decision allowing CWIP on March 5, 2013. The "Settlement Agreement" provided a direct

pathway for the Commission to allow CWIP at its meeting on March 5, 2013. In addition, without the "Settlement Agreement," the legislature would not have enacted the Mississippi Public Utility Rate Mitigation or Reduction Act, House Bill 1134, 128 Leg., Reg. Sess. (Miss. 2013) or House Bill 894, codified at Section 77-3-106 of the Mississippi Code of 1972, as amended which provides for a seven (7) year "rate mitigation plan." The mechanism to establish a seven (7) year "rate mitigation plan" is set forth in the "Settlement Agreement" at paragraph 3 - Stipulated Procedure (b). While the "Settlement Agreement" does not automatically adopt the rate mitigation plan, the plan itself once presented becomes a *fait accompli*. The Commission is a party to the "Settlement Agreement" and is thus obligated to continue a course which provides not only CWIP but other financing necessary what for has become a bottomless pit, i.e., the Kemper County experimental lignite science project. The purported "Settlement Agreement" is much more than a "procedural" document as claimed by Mississippi Power Company through its attorneys. It is in fact a complex financing agreement which allows the Public Service Commission to become Mississippi Power Company's "lender of last resort." The Public Service Commission is supposed to regulate, not finance utilities.

The language of the Commission's March 5, 2013 Final Order, Section E ("Commission Determinations") reveals the extent to which the Commission is bound by the purported "Settlement Agreement."

At paragraph 43, the Commission states that "receiving rate relief during construction is critical to maintaining MPC's financial strength and ready access to capital

markets at a reasonable cost." (R. 984)

At paragraph 44, the Commission states that without "the cash flow that would be provided by increased rates, MPC's credit metrics during the remainder of the construction period will diminish to a level that MPC believes could result in multiple credit rating downgrades beyond those experienced to date." (R. 985)

At paragraph 46, the Commission lauds the Company's "Mirror" CWIP proposal, which is a direct outgrowth of the purported "Settlement Agreement." This discussion continues at paragraph 47. (R. 986-987). The "Settlement Agreement" does not use the phrase "Mirror" CWIP, but does refer to a separate accounting scheme under FASB No. 92.

Paragraph 48 of the Commission's Order resolves any question whether or not the Commission is committed to adopting the seven (7) year rate mitigation plan:

> "Finally, the proposal by the Company of 7-year rate mitigation plan appears to provide a level of rate predictability and stability to all MPC's customers with respect to the Kemper Project." (R. 987)

The language of the Commission's March 5, 2013 Final Order makes clear that the Commission is bound to follow the "Settlement Agreement" and adopt not only the CWIP rate increase but the seven (7) year rate mitigation plan and authorize the issuance of One Billion Dollars ($1,000,000,000.00) in "rate reduction" bonds.

(2) Does Mississippi or federal statutory or constitutional law, or any applicable rule, require Mississippi Power to give notice to ratepayers of proposed rate increases?

RESPONSE NO. 2: **Yes. Due Process as well as Section 77-3-37(8) of the Mississippi Code**

of 1972, as amended, require such notice.

On February 15, 2013, Mississippi Power Company filed Verification of Notice with the Commission which is discussed in the Final Order of the Commission at page 4, (R. 969). The so-called "notice" is more of an advertisement on behalf of Mississippi Power Company, alleging that since 1925, Mississippi Power has met the responsibility of keeping up with the ever-growing Mississippi needs of its customers and the economy of Southeast Mississippi. The notice alludes to the fact that during construction, the Kemper County Energy Facility "is creating 12,000 direct and indirect jobs and upon completion, will provide 1,000 direct and indirect jobs." The notice or advertisement states that "the plant will be fueled by abundant, affordable Mississippi lignite that reduces the volatility of energy prices and helps provide clean, reliable electricity to customers at a significantly lower cost than other alternatives considered." The notice or advertisement concludes as follows:

> "Recently, Mississippi Power submitted a filing to the Mississippi Public Service Commission for the cost recovery of the facility. This filing indicates the need for a 21 percent customer rate increase. In addition, the company made its annual filings with the MPSC to adjust its fuel and base rates, which combined will reduce rates by 2.7 percent if approved. The net affect of all rate action calls for the need of an overall 18.3 percent rate increase for retail customers.
>
> If approved, the requested increase will go into effect in 2013."

In *Goldberg v. Kelly,* 397 U.S. 254 (1970), the United States Supreme Court stated that the "fundamental requisite of due process... is the opportunity to be heard." The Court stated that a hearing must be "at a meaningful time and in a meaningful manner,"

and requires the following:

> "In the present context these principals require that a recipient have timely and adequate notice detailing the reason for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses by presenting his own arguments and evidence orally." (267-268)

Also see *Bowman v. Ferrell,* 627 So. 2d 335 (Miss. 1993).

Rule 9.101 of the Public Utilities Rules of Practice and Procedure states as follows:

> "When a utility makes a standing filing under R.P. 9.100(2) or a filing for a major change under R.P. 9.100(3) or R.P. 9.100(4), the utility shall concurrently provide written notice of the filing to each affected customer, briefly summarizing the proposed changes in rates."

Section 77-3-37(8) of the Mississippi Code of 1972, as amended, requires that major rate changes may only go into effect "pursuant to an order of the commission after hearings held upon notice to the public."

The notice by Mississippi Power Company in this case, as set forth *supra*, does not give customers or ratepayers notice of a date, time and place at which they could contest or comment on Mississippi Power Company's Petition for what can only be deemed as a major rate increase. Section 77-3-37(8) specifically provides that a major rate increase can only be allowed to go into effect by the Commission "after hearings upon notice to the public." Unless that notice provides the date, time and place at which members of the public may appear to contest, comment or simply voice their concerns regarding the proposed rate increase, the provision from Section 77-3-37(8) would have no meaning. If Mississippi Power Company is allowed to give a generalized notice without providing

the foregoing specifics, then the language of Section 77-3-37(8) is reduced to a nullity. If that were the situation, then the statute fails to provide the basic requirements of due process. Further, an interpretation of Section 77-3-37(8) consistent with due process is the appropriate interpretation. See *Williams v. Stevens,* 390 So. 2d 1012 (Miss. 1980).

(3) In *Southern Bell Telephone & Telegraph Co. V. Miss. Public Serv. Comm'n,* 237 Miss. 157, 208, 113 So. 2d 622, 639 (1959), the Mississippi Public Service Commission rejected the utility's request for CWIP costs inclusion in the rate base because, according to the Commission, this would force current ratepayers to pay a return on property constructed for future ratepayers, with the result that when the future ratepayers begin to receive the new, upgraded service, the utility would derive a double return on the cost of construction. Can such a result occur by CWIP costs under the provision contained in the Base Load Act?

RESPONSE NO. 3: **Yes. The Supreme Court's decision in *Southern Bell Telephone & Telegraph Co. v. Miss. Public Serv. Comm'n,* 237 Miss. 157, 208, 113 So. 2d 622, 639 (1959) is directly on point in this case.**

It is Mr. Blanton's position that the scenario described in *Southern Bell Telephone & Telegraph Co. v. Miss. Public Serv. Comm'n,* 237 Miss. 157, 208, 113 So. 2d 622, 639 (195) is precisely the scenario which will occur in this case unless the CWIP assessment is set aside and returned to the present customers of Mississippi Power Company.

Southern Bell actually presages a series of Mississippi Supreme Court cases in which the utility's request for CWIP cost inclusion in the rate base have been denied.

In *Mississippi Public Service Commission v. Mississippi Power Company,* 429 So. 2d 883, 896-98 (Miss. 1983), the Mississippi Supreme Court overruled the Chancellor and upheld the Public Service Commission's decision to deny all CWIP from Mississippi Power Company's rate base.

In *State Ex. Rel. Allain v. Mississippi Public Service Commission,* 435 So. 2d 608, 626-627 (Miss. 1983), the Mississippi Supreme Court again upheld the exclusion of CWIP, expressing a concern similar to the concern expressed in *Southern Bell*:

> "As MP & L contends it would lower future rate based depreciation and tax costs which would benefit future customers as opposed to existing customers." (626)

In *Mississippi Public Service Commission v. Coast Water Works, Inc.,* 437 So. 2d 448, 451 (Miss. 1983), the Mississippi Supreme Court upheld the exclusion of CWIP type expenses, citing its decision in the *Allain* case.

In *State Ex. Rel Pittman v. Mississippi Public Service Commission,* 520 So. 2d 1355, 1363 (Miss. 1987), the Mississippi Supreme Court held that the Public Service Commission cannot grant and Mississippi Power Company cannot collect "a rate increase for power never delivered."

None of the above cases were decided on the specific issues raised by Mr. Blanton: (1) CWIP assessments are an unauthorized and illegal tax; (2) CWIP assessments constitute an unconstitutional and wrongful taking without just compensation; (3) CWIP assessments constitute a pledge in violation of the Mississippi Constitution. Nevertheless, the analysis in each of the above cases is not only consistent with Mr. Blanton's expressed

concerns but each analysis supports the arguments raised by Mr. Blanton.

Taxation.

In *Mayor and Board of Alderman, City of Ocean Springs, Mississippi v. Homebuilders Association of Mississippi, Inc., et al.,* 932 So. 2d 44 (2006), the City of Ocean Springs adopted an ordinance which authorized the assessment or exaction of "development impact fees" which were calculated to defray cost of capital improvements required to accommodate new land development. The lower court held that the impact fees were actually unauthorized taxes. They were an assessment for public purposes without individual privilege or benefit to the payer. The Mississippi Supreme Court upheld the analysis provided by the lower court. Justice Randolph, writing for the majority found as follows:

> "The State of Mississippi has adopted similar distinctions stating 'the chief distinction is that a tax is an exaction for public purposes while a fee relates to an individual privilege or benefit to the payer.' Miss. Atty Gen. Opp. 1996-0425 (1996) (quoting *United States v. River Coal Co.,* 784 F. 2d 1103, 1106 (6th Cir. 1984))."

Ultimately - - and this is extremely important - - the concern expressed by the Court in *Southern Bell* is no different than the concern expressed by this Court in the *Ocean Springs* case. In both cases, individuals in the present are required to defray the cost of capital improvements which may or may not benefit current individuals but do have the likelihood of benefitting individuals in the future. This is the essence of a tax, as defined in the *Ocean Springs* case. However, neither Mississippi Power Company nor the Public

Service Commission has the authority to levy or collect taxes. Section 77-9-19 of the Mississippi Code of 1972, as amended, specifically provides as follows:

> "All taxes, fees and penalties that may be hereafter collected for or in the name of the State of Mississippi *shall be paid direct to the Treasurer of the state*, as now provided by law, by the officer charged with the duty of collecting the same, with an itemized statement to be filed with the State Fiscal Officer, showing from whom collected and to what account to be credited." Emphasis supplied.

Wrongful and Unconstitutional Takings.

As noted, this Court has previously held that Mississippi Power Company cannot collect "a rate increase for power never delivered." *Pittman* at 1363. Mr. Blanton as well as other ratepayers clearly have a property interest and a due process claim when Mississippi Power Company receives something, i.e., Mr. Blanton's and other ratepayers' money and they receive nothing. *Lynch v. Household Finance Corporation,* 405 U.S. 538 (1972).

The analysis set forth in *Southern Bell* and in the cases that followed clearly reflect this Court's concern that present ratepayers are being taxed, i.e., their money is being taken, and they stand to receive nothing in return.

Mississippi Power Company's continued attempt to persuade the Court that an individual's money is not property protected by the United States Constitution is really beyond comprehension. Money is the very essence of property. Money determines the value of property. To tell a victim who has lost his money to a robber that he has not lost his property, then he might suggest commitment papers are in order. "Working capital"

itself cannot and has never generated electricity. For Mississippi Power Company to attempt to use "working capital" as a component of "used and useful" actually confirms Blanton's argument that money (capital) is a specie of property.

Changing the definition of words and terms changes the structure of the regulatory practice in reality. Saying "working capital" is the component of what is "used and useful" is a double change in meaning. "Working capital" in most cases, does not include fixed capital expenditures, but customarily denotes the capital which is variable and provides the liquidity for ongoing operations, such as labor, fuel, maintenance, raw materials and repairs.

The bottom line is that under the analysis set forth in *Southern Bell,* there can be no other conclusion that CWIP assessments constitute a wrongful and unconstitutional taking.

In exchange for the CWIP rate assessment, the ratepayer receives nothing - - not even the promise of cheaper or more efficient electricity in the future. In exchange for what is now an 18% rate assessment, the customer receives no electricity, no security instrument such as a mortgage, stock certificate, debenture or bond. CWIP assessments constitute the very essence of a wrongful and unconstitutional taking without just compensation.

Unconstitutional Pledge.

Article 14 Section 258 of the Mississippi Constitution provides "the credit of the State shall not be pledged or loaned in aid of any person, association or corporation." The

"Baseload Act" violates Article 14, Section 258. This State constitutional violation is totally consistent with the Court's analysis in *Southern Bell.*

The now 18% rate increase constitutes a pledge in violation of Article 14, Section 258 of the Mississippi Constitution. The CWIP assessment is a security for Mississippi Power Company's financial ability to construct the Kemper plant. CWIP assessments are not a one-time assessment to pay for a cost incurred. They are an ongoing financial obligation imposed on Mississippi Power Company customers by the State of Mississippi through the Public Service Commission. The consumer's ability to receive electrical power is now a pledge securing the power company's ability to finance construction of the Kemper plant. Some of the largest consumers of Mississippi Power Company are the State of Mississippi itself, counties, towns, cities, public hospitals, universities and other facilities owned by the State. Further, the nature of the pledge extends further than just CWIP. Ratepayers are now subject to the "non-bypass" provisions of House Bill 894 and House Bill 1134 which deal with the proposed seven-year rate mitigation plan and rate reduction bonds of One Billion Dollars ($1,000,000,000.00).

CWIP assessments, as approved by the Public Service Commission, lend the State's *imprimatur* to the Baseload Act itself.

(4) In general, how does the Commission determine, under the Base Load Act, who (between Mississippi Power and/or its investors and the ratepayers) bears the risks of any uncompleted or abandoned work or project or component associated with a new plant?

RESPONSE NO. 4: **Under the "Baseload Act," the risk of any uncompleted or abandoned work is placed directly on the backs of the ratepayers.**

Under the Baseload Act, the ratepayers bear the risk of any uncompleted or abandoned work or project component associated with the new plant. The fact of the matter is that the plant has skyrocketed from an initial cost of under Two Billion Dollars ($2,000,000,000.00) to over Five Billion Dollars ($5,000,000,000.00). The rate increases imposed by CWIP as well as the proposed seven-year mitigation plan (codified at Section 77-3-106) and rate reduction bonds of One Billion Dollars ($1,000,000,000.00) (codified at Section 77-3-113) place the risk of any uncompleted or abandoned work or project or component associated with the new plant directly on the backs of its ratepayers.

The extent to which the risk of any uncompleted or abandoned work or project or component associated with the new plant begins with the Baseload Act itself. Section 77-3-105(1)(a) of the Act, provides as follows:

> "The commission is fully empowered and authorized to include an electric public utility's rate base and rates, as used and useful components of furnishing electric service, all expenditures determined to be prudently-incurred pre-construction, construction, operating and related costs that the utility incurs in connection with a generating facility (including but not limited to all such costs contained in the utility's 'Construction Work in Progress' or 'CWIP' accounts), *whether or not the construction of any generating facility is ever commenced or completed, or the generating facility is placed into commercial operation*." (Emphasis supplied.)

The extent to which the allocation of risk is placed directly on the back of the ratepayers of Mississippi Power Company is dramatically emphasized by House Bill 1134

which allows the Mississippi Public Service Commission to authorize rate reduction bonds up to a maximum of One Billion Dollars ($1,000,000,000.00). With an eye towards Article 14 Section 258, the legislature in Section 11(1) of House Bill 1134, codified at Section 77-3-127, declares that the statute's rate reduction bonds do not constitute a pledge of the faith and credit of the State of Mississippi. Nevertheless, in the very next section, 11(2), the "state pledges" that it will not take or permit any action that "impairs or attempts to impair" the value of the security property. The statute also makes any challenge to a rate reduction bond set by the Commission virtually impossible. Section 5 of the statute authorizes the Commission to set a bond to cover "customer savings" projected to be realized through the issuance of the security under House Bill 1134. Under Section 5 of the statute, the Public Service Commission is authorized to set an appeal bond in an amount equal to any security approved by the Commission, i.e., One Billion Dollars ($1,000,000,000.00). Section 11(2) also provides that any attempt to impair the security property may result in "just compensation to the security property owner..." These Draconian provisions make any rate reduction bond established by the Commission legally unassailable.

The legislature's declaration in Section 11(1) of House Bill 1134 that the statute's rate reduction bonds do not constitute a pledge is a direct challenge to the judicial branch of government, and in particular, the Mississippi Supreme Court. The Legislature has no authority to transform an unconstitutional statue into a constitutional statute by its own fiat. As this Court stated in *Pascagoula School District v. Tucker,* 91 So. 3d 598, 604

(Miss. 2012) it is the sole responsibility of the judicial branch, and ultimately the Mississippi Supreme Court, to determine the constitutionality of a statute. The legislature's attempt to interfere with this Court's judicial responsibility should be soundly rejected and the Court should find that the "Baseload Act" is, in its entirety, in fact, unconstitutional.

The risk allocation is also reflected in the fact that the rate reduction bonds are "non-bypassable." This means, with respect to rate reduction bond charges, that, so long as rate reduction bonds are outstanding and the related financing costs have not been recovered in full, such charges cannot be avoided by any retail customer of the electric public utility, including special contract customers, or any person located within the electric public utility's certificated area that is directly or indirectly connected to electric facilities of the electric public utilities or its successors or assignees and receiving retail electric service pursuant to a Commission approved rate, even if such retail customer or other person elects to purchases electricity from an alternative supplier. See 77-3-111(i). Rate reduction bond charges of up to One Billion Dollars ($1,000,000,000.00) become a lien not only on the property of rate payers but on the property of other persons located within the electric public utilities certificated areas. House Bill 1134 is shocking in the manner in which it rides rough shod over the rights of ratepayers of Mississippi Power Company within the twenty-three (23) counties served by Mississippi Power Company.

House 894, codified at Section 77-3-106 of the Mississippi Code of 1972, as amended, which provides for a seven-year rate mitigation plan, is no less Draconian and

no less dramatic as it places the allocation of risk on the backs of the ratepayers.

(5) In its order granting a certificate of need in No. 2009-UA-14, the Commission authorized MPC to construct the Kemper facility and to include CWIP in its rates. That order is pending appeal in *Sierra Club v. Mississippi Public Service Comm'n.,* No. 2013-CA-43. Is this case ripe for consideration in the absence of a ruling in Sierra Club? Would a ruling of this Court regarding whether a rate increase based on a plant under construction was just and reasonable be rendered moot if the certificate authorizing the construction of that plant was later held invalid?

RESPONSE NO. 5: **Yes, this case is ripe for consideration due to the fact that Mississippi Power Company is presently collecting an 18% rate increase. No, *Sierra Club v. Mississippi Public Service Commission,* No. 2013-CA-43 does not render this case moot.**

This issue raises a fundamental question: Whether the Commission should have even considered a CWIP rate increase prior to the full resolution of the certificate issued. By allowing a CWIP rate increase in March 2013, the Commission has authorized the wrongful and unconstitutional taking of its customer's money with the real possibility that the ratepayers will receive nothing in return.

On behalf of himself and every other customer of Mississippi Power Company that has sustained a CWIP rate increase, Mr. Blanton calls for the return of our money. Mississippi Power Company and the Commission claimed and extolled the creation of a so-called "mirror" CWIP. If "mirror" CWIP really exists, then it should not be difficult

for Mississippi Power Company to return its customers' money - - and the return should be with statutory interest.

Even if the certificate issue is ultimately decided in Mississippi Power Company's favor, there is no basis to build this plant on the backs of poor people, the unemployed, senior citizens and the disabled, who along with a multitude of others subsist on fixed incomes.

The Sierra Club's certificate challenge does not make the CWIP issue moot, but in fact highlights the injustice of taking ratepayers' money with the real possibility that they will receive nothing in return.

The concern expressed by the Court in *Southern Bell Telephone & Telegraph Company, v. Mississippi Public Service Commission, supra,* dovetails with the position of Mr. Blanton in this case.

(6) In the Settlement Agreement, the Commission acknowledged that "(a) Under the Commission's Final Order on Remand in MPSC Docket No. 2009-UA-14, MPC relied upon the recovery of CWIP financing costs related to the Kemper Project beginning in 2012[.]" When ratepayers/customers received MPC's notice of intent to increase rates in 2011-UN-135 and 2013-UN-014, were the rate increases sought a *fait accompli* as a result of MPC's reliance on the Order in No. 2009-UA-14? If so, did the ratepayers/customers receive notice of the proceedings in No. 2009-UA-14? If they did not, were they entitled to notice?

RESPONSE NO. 6: **Yes. The 2013 rate increase was a *fait accompli.***

The rate increase was in fact a *fait accompli* after Mississippi Power Company and the Commission entered into their purported "Settlement Agreement." If the Court analyzes the manner in which the Settlement Agreement was reached, and the bogus notice that was attempted, then the only conclusion was that once these parties entered into their "Settlement Agreement," the die was cast and that the rate increase in 2013-UN-014 was a *fait accompli*.

There is nothing in the records in these consolidated appeals, dealing with Mississippi Power Company's request for a rate increase in both 2011-UN-135 and 2013-UN-014, which shows that customers received notice of the proceedings in No. 2009-UA-14. However, assuming *per arguendo,* that customers received notice in No. 2009-UA-14 similar to the notice they received in the present case, then the notice in 2009-UA-14 was inadequate and fails as well.

(7) Does the Baseload Act require a finding of prudency by the Commission prior to an increase in rates? If so, was there a finding of prudency made by the Commission? If the Commission made such a finding, when did that occur and what notice as provided to MPC ratepayers/customers of the proceedings? If the Commission has not made a finding of prudency, under what authority did the Commission increase rates?

RESPONSE NO. 7: **There has been no finding of prudency to date.**

Section 77-3-105(2)(a) provides as follows:

> "The commission is authorized to conduct prudent reviews on a periodic or ongoing basis with regard to any pre-construction,

> construction, operating and related costs associated with a generating facility, to hold hearings thereon, and to reflect the outcome of such commission reviews, including commission prudent determinations, in the public utility's rates. The commission is authorized to make and issue such prudent determinations as frequently as each calendar quarter. The commission is authorized to set a procedural schedule for such commission determinations. Any such prudence determinations shall be binding in all future regulatory proceedings affecting such generating facility, unless the generating facility is imprudently abandoned or cancelled.

To date, there has been no finding of prudence by the Commission regarding the Kemper Lignite Plant. In fact, in its Final Order, at paragraph 55, the Commission adamantly maintains that a finding of prudence is not a prerequisite to a rate increase including CWIP construction costs. The Commission has avoided a finding of prudence despite the foregoing section of the Baseload Act and such a finding is virtually impossible, given the facts in this case. See Motion to Dismiss the Petition of Mississippi Power Company for a Finding of Prudence in which Mr. Blanton pointed out the following:

A. How can the Commission make a finding of prudence when there is a serious question whether the Kemper facility will ever become operational?

B. How can there be a finding of prudence when there remains challenges to the underlying permit?

C. How can there be a finding of prudence when the "Settlement Agreement" for reasons outlined in numerous briefs filed before the Mississippi Supreme Court is legally void and violates Rules of Civil and Appellate Procedure?

D. How can there be a finding of prudence when the original cost estimate for

construction of the Kemper facility was 1.8 billion dollars and the cost now exceeds 5 billion dollars, an overrun of approaching 200%?

E. How can there be a finding of prudence when there are questions whether Mississippi Power Company has withheld information from the Public Service Commission regarding cost overruns?

F. How can there be a finding of prudence when there has been no study whatsoever on the impact of the CWIP assessment on customers of Mississippi Power Company?

G. How can there be a finding of prudence when Vice-President Thomas Anderson of Mississippi Power Company was removed from office as the Kemper Facility Project Manager based on his forthright testimony given before the Commission?

H. How can there be a finding of prudence when Mississippi Power Company discovered, after construction had begun, that the groundwater aquifiers are not capable of providing volumes of water to run the gasification process plant, requiring Mississippi Power Company to contract with the City of Meridian to receive its gray water sewage outfall, pipe it to Kemper County and process the sewage water to obtain sufficient water for the plant? Shockingly, customers of Mississippi Power Company are paying and will continue to pay for the City of Meridian's water sewage system.

I. How can there be a finding of prudence when Mississippi Power Company has misjudged the amount of money, amount of pipes and number of people necessary

for construction of the Kemper Project?

J. Perhaps the most compelling evidence against a finding of prudence in this matter is the Southern Company's own form 10-Q filed with the Securities and Exchange Commission for the period ending March 31, 2013. At page 32, Southern Company states as follows:

> "Management believes Mississippi Power's failure to maintain sufficient evidence supporting certain estimated amounts included in the Kemper IGCC cost estimate and to fully communicate the related effects in the development of the Kemper IGCC cost estimate would constitute a material weakness in internal control over financial reporting under standards adopted by the Public Company Accounting Oversight Board and concluded Mississippi Power's internal control over financial reporting was not effective as of December 31, 2012."

As a result of Mississippi Power's mismanagement, Southern Company recorded a pretax charge of $540 Million Dollars in the first quarter of 2013 and it is Blanton's understanding that this figure now exceeds $1 Billion Dollars during the year 2014.[1]

As Mr. Blanton noted in his Motion, the above factors, whether taken individually or together, provides sufficient grounds for the Public Service Commission to dismiss the Petition for Finding of Prudence filed by Mississippi Power Company. If "prudence" is the exercise of "skill and good judgment in the use of resources" (*Merriam Webster,* 2013)

[1]What only be deemed a monumental lack of prudence continues. In April, 2014, according to the joint Form 8-K filed with the Securities and Exchange Commission by the Southern Company and Mississippi Power Company, construction of the Kemper plant was Three Hundred Ten Million Dollars ($310,000,000.00) over budget. According to the same Form 8-K, with the exception of the natural gas combined cycle, the in-service date for Kemper IGCC has been pushed back to the *first half* (not first quarter) of 2015. At a cost over Five Billion Dollars ($5,000,000,000.00), Kemper promises to be the most expensive electricity generating facility ever constructed when measured by the cost per KWH capacity.

then Mississippi Power Company's record regarding the Kemper gasification plant fails by a wide margin.

Not only is the Commission's failure to make a finding of prudence troubling, but equally troubling is the removal in the "Baseload Act" of "used and useful" from the decision whether or not to grant CWIP assessments. Removal of "used and useful" is contrary to basic public utility law. When governmental agencies adopt new rules and regulations, typically there are "public comment" periods to allow the effects of such a change to be analyzed. The present PSC never went through a "public comment" process. Many of the terms of art used within the "Baseload Act" and utilized by the Public Service Commission have never been formally defined.

In *NEPCO, et al. v. Federal Energy Regulatory Commission, et al.,* 668 F. 2d 1327 (D.C. Cir., 1981), the Court of Appeals upheld FERC denial of the utility's request to include unamortized construction expenses that did not result in the operation of facilities "used and useful" in providing electric service. The Court of Appeals stated as follows:

> "The general rule recognized by this court is that expenditure for an item may be included in a public utility's rate base only when the item is "used and useful" in providing service; that is, current rate payers should bear only legitimate cost of providing service to them." 668 F. 2d at 1333

The Commission's failure to make a finding of prudence coupled with the removal of "used and useful" from the "Baseload Act" have enabled Mississippi Power Company to achieve in this case what the Supreme Court deemed impermissible in *State Ex. Rel*

Pittman: "a rate increase for power never delivered."

Finally, given that there has been no finding of prudence, Appellant Blanton would submit that there is no authority for the Commission's rate increase. Section 77-3-105(2)(a) anticipates "prudent reviews on a periodic or ongoing basis with regard to any pre-construction, construction, operating and related cost associated with a generating facility. . . as frequently as each calendar quarter." For the Commission to adamantly maintain in its March 5, 2013 Order that a finding of prudence is not a requisite to a rate increase which includes CWIP construction costs flies in the face of both the language and obvious intent of Section 77-3-105(2)(a). The Commission's position is an abrogation of responsibility which reduces the legislature's provision regarding prudence reviews to a mere nullity, all in an effort to allow Mississippi Power's rate assessment whether objectively prudent or not. Further, if the Commission is correct, then Blanton's contention that a rate increase under the "Baseload Act" is either an illegal tax or an unconstitutional taking is further enhanced.

(8) According to the Commission's brief, notice of a "special meeting" regarding the adoption of the Settlement Agreement was provided "consistent with the Open Meetings Act." Is notice under the Open Meetings Act consistent with the rules of the Commission regarding notice?

RESPONSE NO. 8: **Notice of the "Settlement Agreement" fails under basic constitutional law, Section 25-41-5(2)(3)(a) of the Open Meetings Act which requires five (5) days notice when a public body conducts its meeting through teleconference or video means and Section 77-2-13 which prohibits *ex***

***parte* communications between a public service commissioner and a litigant before the Commission.**

The purported "Settlement Agreement" was nothing more than an attempt to undermine Mr. Blanton's cross-appeal in 2012-UR-1108-SCT. There is nothing in the Commission's rules that allows an agreement to be reached on January 23, 2013, then approved the following day at a "public hearing" before the Public Service Commission on January 24, 2013. At Rule 5.108 of the Public Utilities Rules of Practice and Procedure, the Commission acknowledges that it is subject to the Open Meetings Law, Miss. Code Ann. Section 25-41-1 *et seq.*

Basic constitutional law provides that a "Settlement Agreement" requires adequate notice. See *Goldberg v. Kelly, supra*; *Bowman v. Ferrell, supra.*

Contrary to the comments set forth by counsel for Mississippi Power Company and the Commission, in response to the supplemental citation by Mr. Blanton of the Illinois Supreme Court's decision in *Business and Professional People for the Public Interest, et al., v. Illinois Commerce Commission,* 136 IL 2d. 192, 206-218 (1989), that case is pertinent and significant to the "Settlement Agreement" issue in this case. The holding of the Illinois Supreme Court is precisely the position asserted by Mr. Blanton regarding the purported "Settlement Agreement" executed by the Commission and Mississippi Power Company in January, 2013. The Illinois Supreme Court held that a similar settlement agreement, granting a rate increase to Commonwealth Edison Company, was invalid because all of the parties before the Illinois Commission, including multiple

interveners, had not joined in the so-called agreement.

As the record reflects, Thomas Blanton properly intervened in the case which ultimately is before this Court as Supreme Court No. 2012-UR-01108. His intervention was approved by the Mississippi Public Service Commission. As a party to that case, when Mississippi Power Company filed its appeal, Mr. Blanton filed a proper cross-appeal. As such he was and remains a proper party in the appellate litigation under No. 2012-UR-01108 as well as appeal No. 2013-UR-00477. The purported "Settlement Agreement" that does not include Mr. Blanton's approval is void for the very reasons set forth in *Business & Professional People.* The purported "Settlement Agreement" is not a valid settlement agreement because Mr. Blanton is not a signatory to the document.

Under Section 25-41-5 of the Open Meetings Act, five (5) days notice is required where the public body conducts its meeting through "teleconference or video means." As acknowledged by Mississippi Power Company, Commissioner Pressley attended the meeting on January 24, 2013 by telephone. Mr. Blanton would submit that because Commissioner Pressley attended the meeting by telephone, the requirement for five (5) days notice applies. The meeting was in fact conducted through teleconference, whether a quorum was present at the physical location of the Public Service Commission or elsewhere.

However, even assuming *per arguendo* that the five (5) day notice requirement under Section 25-41-5 does not apply, the "Settlement Agreement" is not only void because Mr. Blanton did join in that agreement, but for another significant reason.

The purported "Settlement Agreement" violates Section 77-2-13 of the Mississippi Code of 1972, as amended, which prohibits *ex parte* communications between a Public Service Commissioner and a litigant before the Commission. In fact, a Commissioner who engages in *ex parte* communications may be "disqualified" under Section 77-2-13(4)(6).

The prohibition against *ex parte* communications between a Public Service Commissioner and a litigant is important and consistent with the Public Service Commission's obligation to "provide fair regulation of public utilities in the interest of the public." See Section 77-3-2 of the Mississippi Code of 1972, as amended. The Public Service Commission is a fiduciary for the citizens of the State of Mississippi. Section 77-2-13 is designed to make certain that the Public Service Commission remains a fiduciary for the people and does not step out of its role to become the effective agent for a public utility such as Mississippi Power Company. See *Pittman v. Public Service Commission,* 538 So. 2d 367, 373 (Miss. 1989).

In *Pittman,* this Court found that in adopting a Rate PEP the Commission had acted outside of its statutory authority. Stated in other terms, the Supreme Court in *Pittman* reversed the Commission because the Commission had abandoned its position as a fiduciary for the people. Likewise, when the Commission entered into the so-called "Settlement Agreement" with Mississippi Power Company in this case, it also abandoned its position as a fiduciary for the people and, further, violated the specific prohibition against *ex parte* communications found in Section 77-2-13.

When this issue came up below, Mississippi Power Company took the position that Mr. Blanton "has apparently misunderstood" Section 77-2-13. Mississippi Power Company took the position that the prohibitions cited by Mr. Blanton only applied to contested proceedings before the Commission and that contested proceedings are only pending until the Commission has issued its "Final Order," citing Section 77-2-13(5). Mississippi Power Company further argued below that the Commission's Order of June 22, 2012 was "its Final Order in the CNP Proceeding."

However, this argument is undercut by the Commission's position in appeal number 2012-UR-01108 prior to the Commission entering into the so-called "Settlement Agreement." In appeal number 2012-UR-01108, the Commission repeatedly took the position that its Order of June 22, 2012 was not a final, appealable order. In *Response Brief of Appellee Mississippi Public Service Commission to Brief of Appellant Mississippi Power Company*, page 1, the Commission stated as follows:

> "First, the Commission's decision to delay Mississippi Power's recovery of Construction Work in Progress (CWIP) financing costs associated with the Kemper Project is *not a final, appealable Order*." (Emphasis supplied).

This position on the part of the Public Service Commission is repeated in the *Response to Brief of Appellee/Cross-Appellee Mississippi Public Service Commission to Brief of Cross-Appellant Thomas A. Blanton*, see pages 5-6.

Further, the Commission attempted to ratify the so-called "Settlement Agreement" on January 24, 2013 at a "public meeting" after giving general notice of said meeting one (1) day earlier on January 23, 2013. Obviously, adequate general notice of this meeting

was not given, and Mr. Blanton received no individualized notice of the proposed ratification meeting even though he was a recognized party in the proceedings. Not even a phone call! Further, Mississippi Power Company will have difficulty in maintaining that there was not an ongoing contested proceeding before the Commission when the "public meeting" was called on January 24, 2013 to "resolve completely and conclude all claims and (sic) brought in the CNP appeal."

The Commission cannot escape the fact that its agents engaged in *ex parte* communications with representatives and employees of Mississippi Power Company, clearly one of the adversaries in this case. The Commission cannot escape the dire implications of those *ex parte* communications which, if the statute is followed, means that the Commission must lose jurisdiction over this matter. Certainly, at a minimum, this Court should find that the alleged "Settlement Agreement"is an invalid instrument and, as such, should be vacated in its entirety.

CONCLUSION

For the reasons set forth in this Brief as well as the prior Briefs filed by Thomas A. Blanton in the above consolidated appeals, Appellant and Cross-Appellant Blanton submits that the "Baseload Act," Section 77-3-101, *et seq.* of the Mississippi Code of 1972, as amended, should be vacated and set aside as an invalid law. This court should also order the repayment to Mississippi Power Company customers all funds collected by Mississippi Power pursuant to the Commission's March 5, 2013, together with statutory interest.

CERTIFICATE OF SERVICE

This is to certify that on this day, I, Michael Adelman, attorney for Appellant and Cross Appellant, Thomas A. Blanton, electronically filed with the Clerk of Court using the Court's MEC System, the above and foregoing **SUPPLEMENTAL BRIEF OF APPELLANT AND CROSS-APPELLANT, THOMAS A. BLANTON** which sent notification of such filing to the following:

Justin Matheny, Esq.
Walter Sillers Building
Office of the Attorney General
550 High Street, Suite 1200
Jackson, MS 39201

Ben H. Stone, Esq.
Tim A. Stone, Esq.
Ricky J. Cox, Esq.
Leo E. Manuel, Esq.
Ronald W. Robertson, Jr., Esq.
Balch & Bingham, L.L.P.
Post Office Box 130
Gulfport, MS 39501

Robert Wiygul, Esq.
Waltzer, Wiygul & Garside
1011 Iberville Drive
Ocean Springs, MS 39564

Further, I hereby certify that I have mailed by United States Postal Service the document to the following non-MEC participants:

Brian U. Ray, Esq.
Mississippi Public Service Commission
501 North West Street
Suite 201-A
Jackson, MS 39201

Shawn S. Shurden, Esq.
Mississippi Public Service Commission
501 North West Street
Suite 201-A
Jackson, MS 39201

This the 13th day of August, A.D., 2014.

s/MICHAEL ADELMAN, ESQ.

MICHAEL ADELMAN, ESQUIRE
ADELMAN & STEEN, L.L.P.
POST OFFICE BOX 368
HATTIESBURG, MS 39403-0368
PH: (601) 544-8291; FAX: (601) 544-1421
MS BAR NO. 1153

ATTORNEY FOR APPELLANT, THOMAS A. BLANTON